



July 26, 2002

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-4109

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166230.

The Texas Department of Human Services (the “department”) received a request for a file held by the credentialing department. The department claims that some of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made of, for, or by a governmental body. Thus, the department must release the submitted information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law.

The department raises sections 552.107 and 552.111 of the Government Code with respect to the information submitted as Attachment D. We note, however, that sections 552.107

and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. *See* Open Records Decision Nos. 630 at 4-7 (1994) (governmental body may waive attorney client-privilege under section 552.107(1)), 470 at 7 (1987) (governmental body may waive section 552.111). Therefore, the department may not withhold Attachment D under sections 552.107(1) or 552.111.

The attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, as the department claims that Exhibit D is protected by the attorney-client privilege, we will consider whether this information is confidential under rule 503.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided that the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

The department informs us that the two documents submitted as Attachment D are communications between an attorney and other personnel of the department. The department states that the purpose of these communications was to submit information for the attorney's review and to provide legal guidance. Based on these representations and our review of the information at issue, we conclude that the department may withhold Attachment D under Texas Rule of Evidence 503.

Next, we address the department's claim under section 552.101 of the Government Code with regard to Attachment C. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The department raises section 552.101 in conjunction with section 242.127 of the Health and Safety Code. Chapter 242 of the Health and Safety Code governs the licensing and regulation of convalescent and nursing homes and related institutions. Section 242.127 provides that "[a] report, record, or working paper used or developed in an investigation made under [subchapter E of chapter 242] and the name, address, and phone number of any person making a report under this subchapter are confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Board of Human Services] or the designated agency." Health & Safety Code § 242.127; *see also id.* § 242.126 (investigation by department or designated agency of report or complaint of abuse or neglect)..

Under section 242.127, the department adopted section 19.2010 of the Texas Administrative Code. Section 19.2010 provides in part:

- (a) Confidentiality. All reports, records, and working papers used or developed by the Texas Department of Human Services (DHS) in an investigation are confidential and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is de-identified. The process of de-identification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to DHS as part of the investigation.

40 T.A.C. § 19.2010(a)(1). The department states that the information submitted as Attachment C relates to an investigation conducted as a result of a report of abuse or neglect of a nursing home resident and thus is subject to section 242.127 of the Health and Safety Code. The department asserts that the highlighted information in Attachment C must be withheld from public release under section 19.2010 of title 40 of the Texas Administrative Code. The department does not inform us that it has been authorized to release any of the highlighted information under section 19.2010(a)(2). Therefore, based on the department's representations and our review of Attachment C, we conclude that these documents are confidential under section 242.127 and that they have been de-identified by the department in accordance with section 19.2010. Thus, the department must withhold the highlighted portions of Attachment C under section 242.127 of the Health and Safety Code and section 19.2010 of title 40 of the Texas Administrative Code.

We note that the information in Attachment C that the department has not highlighted includes two social security numbers. The requestor has a special right of access to his client's social security number under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a). The other social security number may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the department obtained or maintains this social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the department should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the department may withhold the information in Attachment D under Texas Rule of Evidence 503. The department must withhold the highlighted information in Attachment C under section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code and section 19.2010 of title 40 of the Texas

Administrative Code. One of the social security numbers in Attachment C may be confidential under section 552.101 in conjunction with federal law. The department must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

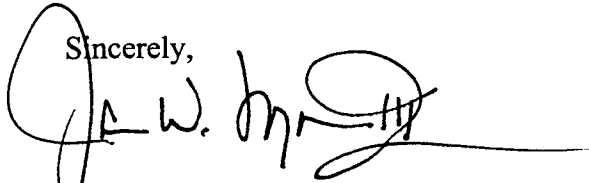
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 166230

Enc: Submitted documents

c: Mr. Ross G. Lavin
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(w/o enclosures)